Supreme Court, U.S.
FILED
OCT 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, AND W.R. GRACE & CO.,

Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Ralph W. Brenner
(Counsel of Record)
Stephen A. Madva
Patrick T. Ryan III
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS
Three Parkway - 20th Floor
Philadelphia, PA 19102
(215) 563-0650

Attorneys for Respondents
The Celotex Corporation and
Carey Canada Inc.

And on behalf of those respondents
listed on inside cover

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

Edward Greer
Alan C. Kessler
Robert T. Carlton, Jr.
MESIROV, GELMAN, JAFFE,
CRAMER & JAMIESON
The Fidelity Building
15th Floor
Philadelphia, PA 19109
(215) 893-5032

Attorneys for Respondent
GAF Corporation

John Patrick Kelley
Catherine N. Jasons
KRUSEN EVANS & BYRNE
Public Ledger Building
5th Floor
Philadelphia, PA 19106
(215) 923-4400

Attorneys for Respondent
Owens-Corning Fiberglas
Corporation

Fredric L. Goldfein
Ellen Brown Furman
GOLDFEIN & JOSEPH
Packard Bldg. - 17th Floor
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 977-9800

Attorneys for Respondent
Asbestos Corporation, Ltd. and
Bell Asbestos Mines, Ltd.

RULE 28.1 STATEMENTS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents make the following statements disclosing parents, non-wholly owned subsidiaries and affiliates:

The Celotex Corporation:
Jim Walter Corporation and Carey Canada Inc.

Carey Canada Inc.:
Jim Walter Corporation and The Celotex Corporation.

GAF Corporation:
None.

Asbestos Corporation, Ltd.:
None.

Bell Asbestos Mines, Ltd.:
None.

Owens-Corning Fiberglas Corporation:
Arabian Fiber Glass Insulation Company (indirectly owned); Norsk Glassfiber A/S (indirectly owned); Oregon Metallurgical Corporation; Verac Technology A/S.

TABLE OF CONTENTS

PAGE

RULE 28.1 STATEMENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. THE THIRD CIRCUIT'S RULE 23(b)(2) DECISION DOES NOT MERIT SUPREME COURT REVIEW BECAUSE BINDING RESOLUTION OF PARTICULAR ISSUES BY DECLARATORY JUDGMENTS IS INAPPROPRIATE IN THIS LITIGATION 2

A. Petitioners' Proposed Mandatory Class Procedure Is Not Appropriate Because Common Questions Do Not Exist In These Actions 4

B. Petitioners' Proposed Mandatory Class Procedure Is Not Appropriate Because The Requirements Of Rule 23(b)(2) Are Not Satisfied 4

C. Petitioners' Proposed Mandatory Class Procedure Raises Constitutional Difficulties 9

II. A MANDATORY CLASS ACTION PROCEDURE WILL NOT RESOLVE THE FUNDAMENTAL PROBLEMS RAISED BY MULTIPLE PUNITIVE DAMAGE CLAIMS 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES:	PAGE
Aetna Life Insurance Co. v. Lavoie, 106 S.Ct. 1580 (1986)	13
Allen v. Illinois, 106 S.Ct. 2988 (1986)	11
In re Arthur Treacher's Franchise Litigation, 93 F.R.D. 590 (E.D. Pa. 1982)	5
In re Asbestos School Litigation, 104 F.R.D. 422 (E.D. Pa. 1984), *affirmed in part and vacated in part sub nom. In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986)	5
Bell v. Wolfish, 441 U.S. 520 (1979)	11
Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979)	11, 12
Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891)	12
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	11
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985)	11-12
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	12
Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979)	6
Kaki v. Aluminum Building Products, 73 Wash.2d 23, 436 P.2d 186 (1968)	12
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	11
Killibrew v. Abbott Laboratories, 359 So.2d 1275 (La. 1978)	12
Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976)	5
Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975)	12

TABLE OF AUTHORITIES—*(Continued)*

CASES: PAGE

Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983) 6

Pereira v. International Basic Economy Corp., 95 P.R.R. 28 (1967) 12

Phillips Petroleum Co. v. Shutts, 105 S.Ct. 2965 (1985) .. 9

In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986) 1, 6, 11

Smith v. Wade, 461 U.S. 30 (1983)..... 11, 12

In re Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980) 6

United States v. New York Telephone Co., 434 U.S. 159 (1977)..... 11

Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 289 A.2d 66 (1972) 12

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V 10

U.S. Const. Amend. XIV 10, 13

STATUTES:

Asbestos Hazard Emergency Response Act of 1986, H.B. 5073 and S. 2083 10

COURT RULES:

Federal Rule of Civil Procedure 23

Rule 23(a) 4
Rule 23(b)(1)(B) 1, 2, 10, 11, 13, 14
Rule 23(b)(2) 1-10, 14
Rule 23(b)(3)..... 1, 4, 9
Rule 23(c)(4)(A) 2, 7, 8

TABLE OF AUTHORITIES—*(Continued)*

COURT RULES: PAGE

Rules of the Supreme Court of the United States
Rule 17.1 3
Rule 21.1(a) 11

TREATISES:

Dobbs, *Remedies*, §4.1 (1973) 6

7A Wright & Miller, *Federal Practice and Procedure* §1775 (1972) 8

Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) 13

OTHER:

Supplementary Note of the Advisory Committee Regarding 1966 Amendments to Rule 23 ..... 5, 7, 8

Environmental Protection Agency Advance Notice of Proposed Rulemaking: Asbestos-Containing Materials in Schools; Inspection, Notification, Management Plans, and Technical Assistance, 51 Fed. Reg. 28,914 (1986) 10

INTRODUCTION

This Brief in Opposition is submitted in response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit ("Petition"), which was filed by defendants National Gypsum Company, United States Gypsum Company and W.R. Grace & Co. ("Petitioners") on August 30, 1986. The Petition asks this Court to review those portions of the judgment of the United States Court of Appeals for the Third Circuit in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), which vacated the District Court's Rule 23(b)(1)(B) certification of a nationwide mandatory class of public and private schools ("school districts") for the litigation of punitive damage claims and which affirmed the District Court's denial of Rule 23(b)(2) class certification.

The instant Petition is the second of two Petitions for Writ of Certiorari which ask this Court to review portions of the Third Circuit's judgment. On July 30, 1986, Respondents filed a Petition for Writ of Certiorari at No. 86-140 ("Respondents' Petition") seeking review of the Third Circuit's judgment insofar as it affirmed the District Court's Rule 23(b)(3) certification of a nationwide class for the litigation of the school districts' thousands of compensatory damage claims.

Respondents submit that the instant Petition should be denied. As Respondents' Petition demonstrates, the multitude of individual factual and legal questions that would have to be decided under the varying products liability laws of every jurisdiction in the nation make *any* type of class litigation — mandatory or otherwise — inappropriate in these actions. For this reason, those portions of the Third Circuit's judgment which Petitioners seek to reverse were correctly decided. Moreover, while Respondents entirely agree that decisive action is needed to combat the problems of arbitrary, capricious, multiple and runaway punitive damage awards, the mandatory class "solutions" proposed by Petitioners, like the lower courts' Rule 23(b)(3) decisions, are unworkable, inconsistent with the standards of Rule 23, and, if permitted by this Court, could impair established principles of constitutional law. Since the Third Circuit's Rule 23(b)(1)(B) and

Rule 23(b)(2) decisions accomplish the proper result by precluding class treatment, these decisions do not require Supreme Court review and should be left in place.[1]

While the Petition presents four discrete questions for Supreme Court review, basically two issues are involved: (a) the problems posed by multiple claims for punitive damages in nationwide litigation and (b) the propriety of "binding resolution" of particular issues by declaratory judgments when the primary relief sought is money damages. This Brief in Opposition will address the latter issue first.

ARGUMENT

I. THE THIRD CIRCUIT'S RULE 23(b)(2) DECISION DOES NOT MERIT SUPREME COURT REVIEW BECAUSE BINDING RESOLUTION OF PARTICULAR ISSUES BY DECLARATORY JUDGMENTS IS INAPPROPRIATE IN THIS LITIGATION

Petitioners seek review of the Third Circuit's Rule 23(b)(2) decision in order to "establish the propriety of [using the Rule 23(b)(2) mandatory class] procedure" in multi-plaintiff products liability cases like the present actions for the "issuance of declaratory judgments binding on all school districts and all defendants" to resolve certain alleged common questions pursuant to Rule 23(c)(4)(A). Petition at 21.[2] The Petition asserts, for example, that "a declaratory judgment determining whether asbestos-containing products in schools pose a hazard will not only resolve the liability of defendants but also give the nation's school districts standards concerning the need for abatement." Petition at 26.

---

1. Should the Court grant the instant Petition, however, Respondents request that it do so for the purpose of affirming the Third Circuit's Rule 23(b)(1)(B) and Rule 23(b)(2) decisions solely on the grounds set forth herein.

2. Rule 23(c)(4)(A) provides that, "[w]hen appropriate[,] . . . an action may be brought or maintained as a class action with respect to particular issues. . . ." Respondents do not dispute the lower courts' ability, in a proper case, to isolate certain issues for class treatment under Rule 23(c)(4)(A). The Petition, however, completely fails to take into account the other requirements of Rule 23 that serve to limit the situations in which such a procedure is "appropriate."

Petitioners argue that "[t]he Third Circuit's denial of mandatory class certification has erroneously deprived petitioners of a cost-efficient single adjudication of their liability for the sale of asbestos-containing products for use in school buildings," and they urge this Court to "establish that a mandatory class action should be used to decide the common factual issues, including punitive damages claims, in mass product liability litigation." Petition at 8, 11.

Petitioners have taken the same approach to the question of class certification in these actions that class plaintiffs take in their Brief in Opposition to Respondents' Petition. Faced with overwhelmingly adverse precedent against class certification of similar products liability and toxic tort claims because of the numerous individual factual and legal questions involved, Petitioners emphasize the purported cost efficiencies of class litigation without regard to whether class certification (mandatory or otherwise) in these actions is permissible under the law. For the reasons which follow, mandatory class certification is not permissible in these actions.

Petitioners' Rule 23(b)(2) arguments do not satisfy the standards for granting review by writ of certiorari that are set out in Rule 17.1 of the Rules of the Supreme Court of the United States. Petitioners do not (and cannot) claim that there is any conflict among the federal circuits on the use of Rule 23(b)(2) or that there has been any departure from the usual and accepted course of judicial proceedings. To the contrary, Petitioners themselves are admittedly asking this Court to approve a radical departure from the usual and accepted application of Rule 23(b)(2). *See* Petition at 26-27. Finally, Petitioners' Rule 23(b)(2) arguments do not raise important questions of federal law because Rule 23(b)(2) was not intended to provide for the binding resolution of particular issues in actions, such as these, in which the primary relief sought is money damages and not injunctive or declaratory relief with respect to the class as a whole.

A. Petitioners' Proposed Mandatory Class Procedure Is Not Appropriate Because Common Questions Do Not Exist In These Actions

The Petition repeatedly alleges the existence of various common questions in these actions which were not identified as such by the courts below and which, upon close analysis, do not present common factual or legal questions at all. For example, the Petition asserts, at 21, that multi-plaintiff products liability cases "inevitably present a core of common questions on such issues as negligence, unreasonable danger, state-of-the-art, and the justifiability and amount of punitive damages."

The specific issues that the Petition identifies, *i.e.*, (1) the risk associated with the level of asbestos fibers normally found in the air in school buildings, (2) the state-of-the-art defense, and (3) the statute of limitations defense, *see* Petition at 5 n.4, are not susceptible to litigation on a common basis. The question of what level of asbestos exposure poses an unreasonable health risk, while of great importance to both plaintiffs and defendants, cannot be adjudicated in a vacuum in our legal system. Similarly, the question of what the defendants and the school districts knew or should have known will vary from school district to school district depending upon which finished product is involved and when (over a thirty year period) it was sold or installed.

As Respondents' Petition demonstrates, the courts below erred in their application of the legal standards of Rule 23 in permitting these actions to proceed under Rule 23(b)(3). That erroneous common question analysis — which also forms the basis of Petitioners' Rule 23(b)(2) argument — makes any type of class certification inappropriate in these actions.

B. Petitioners' Proposed Mandatory Class Procedure Is Not Appropriate Because The Requirements Of Rule 23(b)(2) Are Not Satisfied

Rule 23(b)(2) of the Federal Rules of Civil Procedure provides that an action may be certified for class treatment where, in addition to satisfying the requirements of Rule 23(a), the proponent of class certification establishes that:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

It is well-established that "subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Supplementary Note of Advisory Committee Regarding 1966 Amendments to Rule 23. In denying Rule 23(b)(2) certification, the District Court stated, "Despite the ingenuity of plaintiffs' claims for equitable remedies, this case remains at bottom, one for legal damages." *In re Asbestos School Litigation*, 104 F.R.D. 422, 438 (E.D. Pa. 1984).[3] The Third Circuit held that this determination was a correct application of Rule 23(b)(2) to class plaintiffs' claims and affirmed the District Court's Rule 23(b)(2) decision as neither an error of law nor an abuse of discretion. The Third Circuit stated:

> Precedent supports the district court's view that an action for money damages may not be maintained as a Rule 23(b)(2) class action. *See, e.g., Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *In re Arthur Treacher's Franchise Litigation*, 93 F.R.D. 590, 594 (E.D. Pa. 1982). We see no justification for overturning the district judge's evaluation of the realities of the litigation before him. Counsel's desire to have a mandatory class is understandable, but the case for such a certification has not been established.

---

3. Class plaintiffs argued to the District Court that their claims warranted Rule 23(b)(2) certification because they were seeking injunctive remedies. They suggested that the test to be applied is whether the action is one "traditionally considered equitable in nature" and asserted that they were seeking four varieties of "equitable" relief: three forms of "mandatory injunctive relief" (future abatement action and two types of "monitoring services") and "equitable restitution." *See Asbestos School Litigation*, *supra*, 104 F.R.D. at 438. Class plaintiffs, however, did *not* appeal the District Court's denial of Rule 23(b)(2) certification to the Third Circuit and have never challenged the District Court's characterization of their claims under Rule 23(b)(2). Indeed, Petitioners themselves concede that "the primary relief claimed by class members is monetary damages." Petition at i.

School Asbestos Litigation, *supra*, 789 F.2d at 1008.[4]

The Third Circuit's Rule 23(b)(2) decision does not merit Supreme Court review because the courts below correctly ruled that class plaintiffs' claims are not "equitable" claims. In particular, the District Court correctly held that what class plaintiffs labeled as "equitable restitution" is in essence a claim for damages, not restitution.[5] Moreover, class plaintiffs' request for the payment of future remedial expenses is not sufficiently equitable in nature to bring it within Rule 23(b)(2). "A plaintiff cannot transform a claim for damages into an equitable action simply by asking for an injunction that orders the payment of money." *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979).[6]

Although class plaintiffs sought Rule 23(b)(2) certification in the District Court on the basis that they were seeking injunctive relief, Petitioners argue that Rule 23(b)(2) certification would be

4. In other products liability cases when injunctive relief was requested, courts have found class certification inappropriate under Rule 23(b)(2) because the relief requested related primarily to money damages. In *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 n. 3, (D. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983), for example, class certification was denied under Rule 23(b)(2), even though an injunction was sought ordering defendants to notify interested parties about DES, establish free clinics, stop "mass-marketing testing," and establish an insurance fund, because the predominant relief sought was money damages.

5. The equitable remedy of restitution looks to what a defendant has unjustly gained or received while the legal remedy of damages looks to what a plaintiff has unjustly lost. As one commentator has stated:

> [W]hat is common in [restitution] cases is that the defendant is liable for the gains he has made in the transaction, or what is now called his unjust enrichment. The restitution claim stands in flat contrast to the damages action in this respect. *The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.*

Dobbs, *Remedies*, §4.1 at 224 (1973) (emphasis added) (footnote omitted).

6. In *Jaffee*, the Third Circuit rejected the notion that the relief sought was equitable because plaintiff requested "a traditional form of damages in tort — compensation for medical expenses to be incurred in the future . . . ," and because "the payment of money would fully satisfy Jaffee's 'equitable' claim. . . ." *Accord*, *In re Three Mile Island Litigation*, 87 F.R.D. 433, 442 (M.D. Pa. 1980).

proper because *declaratory relief*, a completely different type of remedy than that sought by class plaintiffs in the District Court, is appropriate for class treatment under Rule 23(b)(2). *See* Petition at 21-26.[7]

In focusing on the type of remedy they seek, Petitioners ignore, as did class plaintiffs before the District Court, the other requirements of Rule 23(b)(2). As explained in the Supplementary Note of the Advisory Committee Regarding 1966 Amendments to Rule 23(b)(2), "subdivision [(b)(2)] is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate."

First, the issuance of declaratory judgments on Petitioners' alleged common questions would not "settle the legality" of any conduct "with respect to the class as a whole." As discussed above, the numerous individual questions to be decided in "settling the legality" of the defendants' conduct make such a task impossible. Indeed, even if Petitioners' proposed mandatory class procedure were permissible, the remaining unresolved issues that would have to be decided on an individual basis before any liability determination could be made render Petitioners' proposed procedure unworkable.[8]

---

7. None of the Complaints in these actions seeks declaratory relief of the kind discussed in the Petition. There is thus no basis in the pleadings for Petitioners' argument that the District Court should have certified a mandatory class under Rule 23(b)(2) to resolve Petitioners' allegedly common issues on a declaratory basis under Rule 23(c)(4)(A).

8. The references in the Petition, at 21-22 and nn.23-25, to a number of instances in which courts have permitted a single trial of numerous plaintiffs' toxic tort claims are irrelevant to the present litigation. In each of these cases, all plaintiffs in the consolidated actions were before the court and each had the burden of proving his/her own claim. No plaintiff was attempting to prove another plaintiff's claim by virtue of the proof of his/her own claim, as representative plaintiffs must do. The flaw in Petitioners' analogy to the procedure of consolidating claims is thus, in their own words, the suggestion that "[t]his approach . . . be taken a step further" and applied to representative litigation under Rule 23. *See* Petition at 23.

Second, The Petition completely ignores Rule 23(b)(2)'s requirement that the party opposing the class have taken action or have refused to take action with respect to the class as a whole. The only circumstances in which the defendants have refused to act on grounds generally applicable to the class is their refusal to perform or pay for abatement work that class plaintiffs contend is necessary. This refusal cannot be sufficient under Rule 23(b)(2). If an action could be certified as a class action under subdivision (b)(2) simply because the defendants had refused to provide plaintiffs with the remedy they sought, every purported class action — especially class actions seeking money damages — would satisfy Rule 23(b)(2).

Finally, Petitioners' reliance on Rule 23(c)(4)(A) in order to support the certification of a mandatory Rule 23(b)(2) class is misplaced. Rule 23(b)(2) is only applicable when final injunctive relief or *corresponding declaratory relief with respect to the class as a whole* is appropriate. This standard plainly applies only to declaratory relief that *corresponds* to final injunctive relief. In this regard, the Supplementary Note of the Advisory Committee Regarding 1966 Amendments to Rule 23(b)(2) states that "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." As Professors Wright and Miller explain:

> *[T]he declaration should be equivalent to an injunction.* . . . A request for a declaration that a particular patent is invalid or that a statute is unconstitutional would qualify as "corresponding declaratory relief" because the resulting judicial directive would have the effect of "enjoining" the enforcement of the patent or the statute. On the other hand, an action seeking a declaration that certain conduct constitutes a breach of contract would not qualify under Rule 23(b)(2) because the effect simply is to lay the basis for a damage award rather than injunctive relief.

7A Wright & Miller, *Federal Practice and Procedure*, §1775 at 22 (1972) (emphasis added). Petitioners are not seeking declaratory relief; they simply want the District Court to make certain findings of fact.

Accordingly, because the approach requested by Petitioners is unworkable, improper under Rule 23(b)(2) and inappropriate to these actions, it was neither an abuse of discretion nor an error of law for the District Court to decline to follow it. The Third Circuit's affirmance of that Rule 23(b)(2) decision was correct and does not merit Supreme Court review.

C. Petitioners' Proposed Mandatory Class Procedure Raises Constitutional Difficulties

Petitioners' Rule 23(b)(2) argument, if adopted, would eviscerate Rule 23(b)(3) by permitting any defendant in any class action — whether mandatory or opt-out — to assert that it wanted declaratory relief as to all class members, with no provision for opt-outs, in order to resolve certain issues of its choosing.[9]

This attempt to obtain a "binding resolution" of individual damage claims in a nationwide diversity action raises a serious due process problem of involuntary joinder of plaintiffs in a forum which lacks personal jurisdiction over them. This precise issue was noted in *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965, 2972-77 (1985). In *Shutts*, however, an opt-out provision obviated the problem. Here, by contrast, the entire thrust of Petitioners' Rule 23(b)(2) argument is that no opt-outs will be permitted.

Petitioners' proposed binding declaratory judgments are impermissible for the additional reason that their goal of having the United States District Court for the Eastern District of Pennsylvania, sitting in diversity, establish a nationwide exposure standard will cause the District Court to invade the provinces of

9. For example, a defendant in a Rule 23(b)(3) securities fraud action could request the court to certify a mandatory class on the questions of whether a prospectus contained any misrepresentations or omissions of fact and whether any such misrepresentations or omissions were material. Such a procedure purportedly would bind even those investors who had opted out of the Rule 23(b)(3) class. Likewise, a defendant in a products liability action could seek declaratory relief on the issue of whether its product was defective and purport to bind all purchasers of the product to that determination regardless of the individual circumstances surrounding the product's use by each purchaser.

Congress, the federal Environmental Protection Agency ("EPA") and the States in violation of the principles of federalism and the separation of powers. *See* Respondents' Petition at 12-14 and Reply Brief in Support of Respondents' Petition at 5-7.[10]

It is, however, unnecessary for the Court to reach these constitutional difficulties within the context of determining whether to grant review of the Third Circuit's Rule 23(b)(2) decision. Since the Third Circuit's affirmance of the District Court's denial of Rule 23(b)(2) certification simply followed the usual and accepted application of subdivision (b)(2), Supreme Court review is not warranted.

II. A MANDATORY CLASS ACTION PROCEDURE WILL NOT RESOLVE THE FUNDAMENTAL PROBLEMS RAISED BY MULTIPLE PUNITIVE DAMAGE CLAIMS

The basic thrust of Petitioners' Rule 23(b)(1)(B) argument is that mandatory class treatment of class plaintiffs' punitive damage claims is appropriate because of the likelihood that multiple punitive damage awards will violate the due process rights of the defendants. *See* Petition at 11-18. Petitioners' proposed procedural solution, however, merely addresses the symptoms of the problem without reaching the cause.

Should this Court grant review of the Third Circuit's Rule 23(b)(1)(B) decision vacating the certification of a mandatory punitive damage class, Respondents request that the Court do so for the purpose of affirming the Third Circuit's decision on the ground that, absent procedural safeguards, any award of punitive damages in these actions would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[11]

---

10. In this regard, both the Senate and the House of Representatives have now passed the Asbestos Hazard Emergency Response Act of 1986, H.B. 5073 and S. 2083, and the EPA has issued an Advance Notice of Proposed Rulemaking on Asbestos-Containing Materials in Schools; Inspection, Notification, Management Plans, and Technical Assistance, 51 Fed.Reg. 28,914 (1986).

11. Respondents raise this issue in this Brief in Opposition rather than in a Cross-Petition because they do not seek any change in the Third Circuit's judgment vacating the District Court's Rule 23(b)(1)(B) class certification. *See*

This Court has often recognized that the Due Process Clauses protect against undue punishment in non-criminal contexts. *See, e.g., Allen v. Illinois*, 106 S.Ct. 2988 (1986); *Bell v. Wolfish*, 441 U.S. 520, 535-38 (1979). *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-69 (1963). It has also acknowledged that punitive damages are a deterrent, intended to punish a defendant rather than compensate a plaintiff. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). Indeed, as the Third Circuit noted, punitive damage awards "act almost as a form of criminal penalty administered in a civil court at the request of a plaintiff who serves somewhat as a private attorney general." *School Asbestos Litigation*, *supra*, 789 F.2d at 1003.

Punitive damage awards, however, historically have been arbitrary, capricious and often completely unrelated to the type or extent of the injury that the plaintiff has suffered. For these reasons, various members of this Court have expressed concern regarding the largely uncontrolled ability of civil juries and courts to impose punitive awards on defendants with few, if any, procedural safeguards. In *Smith v. Wade*, 461 U.S. 30 (1983), for example, then Justice (now Chief Justice) Rehnquist, who was joined in dissent by Chief Justice Burger and Justice Powell, stated:

> [A]lthough punitive damages are "quasi-criminal," . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors.

Id. at 59 (Rehnquist, J., dissenting). Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939

United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977). Moreover, this issue is "fairly included" within Petitioners' third question presented for review, *i.e.*, "May a district court properly certify a nationwide Rule 23(b)(1)(B) mandatory class for punitive damages?" Petition at i. *Cf.* Rule 21.1(a) of the Rules of the Supreme Court of the United States.

(1985), Justice Brennan, who was joined in dissent by Justices Marshall, Blackmun and Stevens, wrote that the Court's cases have

> recognize[d] that "the alleged deterrence achieved by the punitive damage awards is likely to be outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined."

Id. at 2956-57 n.4, *quoting Smith v. Wade*, *supra*, 461 U.S. at 59 (Rehnquist, J., dissenting). Likewise, in *Brotherhood of Electrical Workers v. Foust*, *supra*, Justice Marshall, who was joined by Justices Brennan, Stewart, White and Powell, stated:

> Because juries are accorded broad discretion as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial.

442 U.S. at 50. Justice Marshall added that another danger of the unfettered discretion given to civil juries is that punitive damages "may be employed to punish unpopular defendants." *Id.*

Because of the above considerations, a number of jurisdictions prohibit the imposition of any punitive damage awards. *See, e.g., Killibrew v. Abbott Laboratories*, 359 So.2d 1275 (La. 1978); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972); *Kaki v. Aluminum Building Products*, 73 Wash.2d 23, 436 P.2d 186 (1968); *Pereira v. International Basic Economy Corp.*, 95 P.R.R. 28 (1967); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891).

In these diversity actions, the District Court is obliged under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to apply the substantive law of every jurisdiction in the country. *See* Respondents' Petition at 20-29. Because the punitive damage laws of the various jurisdictions not only vary but generally lack the type of procedural safeguards that are necessary to limit the power of the government to impose punishment on persons in

civil litigation, any award of such damages by the District Court in these actions would violate the defendants' due process rights. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269 (1983)

In *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), a case decided last Term, this Court noted but did not reach the issue of whether a punitive damage award offended due process. The petitioner in *Aetna* argued, *inter alia*, that the "lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 1589 This Court found it unnecessary to reach the due process question in *Aetna* but stated that it "raise[s] important issues which, in an appropriate setting, must be resolved." *Id.* This case could provide that setting.

Accordingly, Respondents request that, if the Court grants review of the Third Circuit's Rule 23(b)(1)(B) decision, it do so solely for the purpose of affirming that decision on the ground that, without procedural safeguards, any punitive damage award would violate the Due Process Clauses and that, for this reason, there is no basis for a mandatory punitive damage class in these actions.

CONCLUSION

For the reasons set forth herein, Respondents request that the Petition for Writ of Certiorari be denied. However, should this Court grant the Petition, Respondents urge affirmance of the Third Circuit's Rule 23(b)(1)(B) and Rule 23(b)(2) decisions on the grounds set forth above.

Respectfully submitted,

Ralph W. Brenner
(Counsel of Record)
Stephen A. Madva
Patrick T. Ryan III
MONTGOMERY, McCRACKEN,
WALKER & RHOADS
Three Parkway—20th Floor
Philadelphia, PA 19102
(215) 563-0650

Attorneys for Respondents
The Celotex Corporation and
Carey Canada Inc.

And on behalf of:

Edward Greer
Alan C. Kessler
Robert T. Carlton, Jr.
MESIROV, GELMAN, JAFFE,
CRAMER & JAMIESON
The Fidelity Building
15th Floor
Philadelphia, PA 19109
(215) 893-5032

Attorneys for Respondent
GAF Corporation

John Patrick Kelley
Catherine N. Jasons
KRUSEN EVANS & BYRNE
Public Ledger Building
5th Floor
Philadelphia, PA 19106
(215) 923-4400

Attorneys for Respondent Owens-Corning Fiberglas Corporation

Fredric L. Goldfein
Ellen Brown Furman
GOLDFEIN & JOSEPH
Packard Bldg.—17th Floor
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 977-9800

Attorneys for Respondents Asbestos Corporation, Ltd. and Bell Asbestos Mines, Ltd.